

July 25, 2013

Alex Mayer
Staff Attorney
Central Valley Regional Water
Quality Control Board
P. O. Box 100
Sacramento, CA 95812-0100

Re: Your Request for Advice
Our File No. A-13-077

Dear Mr. Mayer:

This letter responds to your request for advice on behalf of Jennifer Lester Moffitt, a board member of the Regional Water Quality Control Board, Central Valley Region (the “Central Valley Water Board”), regarding her duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹

Please note that the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) In addition, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090 or common law conflict of interest.

QUESTION

May Mrs. Moffitt take part in decisions by the Central Valley Water Board regarding a General Waste Discharge Requirements Order for the Sacramento Valley region despite having an interest in her parent’s farm as a source of income, which is subject to the order?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

To the extent that the foreseeable cost increases to Dixon Ridge Farms are less than \$5,000 as you have stated and barring additional facts, Mrs. Moffitt may take part in decisions regarding the order because the decisions do not appear to have a reasonably foreseeable material financial effect on her interest in her parent's farm or her personal finances.

FACTS

Mrs. Moffitt is a member of the Central Valley Water Board, a state agency that regulates water quality issues within the Central Valley region. One of the responsibilities of the Central Valley Water Board is to regulate the discharges of waste from agricultural operations.

On December 7, 2012, the Central Valley Water Board adopted General Waste Discharge Requirements Order R5-2012-0116. This order was the first of eight to twelve general orders to be issued in the Central Valley Region regulating discharges from irrigated agricultural lands to protect surface water and groundwater. The various orders will regulate different geographical areas. One of those remaining general orders will be an order regulating agricultural operations in the Sacramento Valley Watershed (the "Sacramento Valley Order").

A multitude of different crop types and operations will be covered by the Sacramento Valley Order, including tree nuts, nurseries, corn, wheat, tomatoes, and wine/grape vineyards, as well as others. The Central Valley Water Board staff estimates that there will be approximately 11,000 distinct business entities that will be subject to the Sacramento Valley Order. Depending on their geographic location, dischargers will be placed into one of two tiers, each with different requirements based on risk to water quality. These geographic locations will be determined by the Central Valley Water Board's Executive Officer approximately one year after adoption of the Sacramento Valley Order and will be based on consideration of a Groundwater Assessment Report submitted by groups representing the growers.

One of the business entities that will be subject to the Sacramento Valley Order is Dixon Ridge Farms, located in Winters, California. Dixon Ridge Farms is a sole proprietorship owned by Mrs. Moffitt's parents. Dixon Ridge Farms operates an organic walnut farming and processing business operating on 1,356 acres of irrigated lands. Dixon Ridge Farms owns all 1,356 acres of the irrigated lands used in the operations. Using generally accepted accounting principles, Dixon Ridge Farms' net income during its most recent fiscal year was less than \$750,000. Dixon Ridge Farms is currently enrolled in the Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands, which the Sacramento Valley Order will supersede.

Mrs. Moffitt is an employee of the Dixon Ridge Farms, serving as its managing director, but has no ownership interest in the company. The only income Mrs. Moffitt receives from Dixon Ridge Farms is a fixed salary that is not linked to financial performance of the company.

The Central Valley Water Board staff has not yet completed its draft of the Sacramento Valley Order, which must be adopted by the Central Valley Water Board following public review and comment. Accordingly, staff has not yet prepared an estimate of grower costs associated with the order. However, based on two prior Irrigated Lands Regulatory Program General Order cost estimates prepared by staff, it appears that the cost increases to Dixon Ridge associated with the new order will be less than \$5,000 per year.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

Step One: Is the individual a “public official?”

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency....” (Section 82048.) As a member of the Central Valley Water Board, Mrs. Moffitt is a public official within the meaning of the Act.

Step Two: Is the official making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Mrs. Moffitt is making, participating in making, or influencing a governmental decision when taking part in decisions by the Central Valley Water Board regarding the Sacramento Valley Order.

Step Three: What are the official's interests that may be affected by the decision?

Of the interests recognized under Section 87103 of the Act², those interests that may be implicated by your account of the facts are the following:

Business Entity – A public official has an interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a) and (b).)

Source of Income – A public official has an interest in any source of income, including promised income, which aggregates to \$500 or more within the 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

Personal Finances – A public official has an interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Dixon Ridge Farms:

While Mrs. Moffitt has no ownership in Dixon Ridge Farms, she currently serves as the managing director. As a manager and employee, Ms Moffitt has an interest in Dixon Ridge Farms as a business entity under Section 87103(d). It also appears that Mrs. Moffitt has received income from Dixon Ridge Farms of \$500 or more in the 12 months prior to any decisions by the Central Valley Water Board regarding the Sacramento Valley Order. Accordingly, it appears that Mrs. Moffitt also has an interest in Dixon Ridge Farms as a source of income. (Section 87103(c).)

Personal Finances:

A public official always has an interest in his or her personal finances. A governmental decision will have an effect on this interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)

Step Four: Are the official's interests directly or indirectly involved in the decision?**Dixon Ridge Farms:**

Regulation 18704.1(a) states that a business entity or source of income is *directly* involved in a decision before the official's agency when that business entity or source of income, either directly or by an agent:

² Our analysis is limited to the interests you have identified.

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

A business entity or a source of income that is not directly involved in a governmental decision is regarded as *indirectly* involved. (Regulations 18704(a) and 18704.1(b).)

While a business interest is directly involved in a decision under Regulation 18704.1(a)(2) if the decision involves a permit with or entitlement for the business, it is not clear whether or not a business interest is directly involved in a decision regarding a general permit affecting an entire industry. In regard to the adoption of General Wastewater Discharge Requirements, we have recently advised that an official’s interests in a business were directly involved in a decision regarding a similar order issued by the Central Coast Water Quality Control Board. (*Jahr* Advice Letter, No. A-13-045.) However, this determination contradicts earlier advice that interests in agriculture businesses were indirectly involved in decisions by the Shasta Valley Resource Conservation District and the Siskiyou Resource Conservation District regarding a master permit for agriculture operators who divert the natural flow of a river. (*Guarino* Advice Letter, No. A-10-027.)

Moreover, we have often advised that interests in businesses are only indirectly involved in decisions regarding general ordinances or regulations affecting a substantial number of similar businesses. For example, we have previously advised that an official’s interest in a winery was indirectly involved in a decision regarding an ordinance affecting all wineries in the county (*Cooke* Advice Letter, No. A-99-127) and that an official’s interest in a flower growing business was indirectly involved in a decision to set irrigation rates for a water district, where 50-percent of the district’s water usage was for agricultural purposes (*Myers* Advice Letter, No. A-11-177b).

Pursuant to past advice, Mrs. Moffitt’s business interest is not directly involved in the adoption of the Sacramento Valley Order merely because the business plans to enroll in the order. Considering the large number of agricultural businesses affected by the general order, there is no reason to distinguish the adoption of the Sacramento Valley Order from other decisions regarding general ordinances or regulations. Accordingly, Mrs. Moffitt’s interest in Dixon Ridge Farms is only indirectly involved in a decision regarding the Sacramento Valley Order.³

³ We thereby supersede the *Jahr* Advice Letter, *supra*, to the extent that it applies the “directly involved” standard to interests in a business involved in a decision regarding the General Wastewater Discharge Requirements, rather than the “indirectly involved” standard.

Personal Finances:

An official's interest in his or her personal finances is deemed to be directly involved in the governmental decision if facts suggest any financial effect on his or her personal finances. (Regulation 18704.5.)

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's interests?

Materiality

Having identified the interests involved, and determined whether each interest is directly or indirectly involved in the decision at issue, it is necessary to identify the materiality standard appropriate to each interest.

Dixon Ridge Farms:

For business entities *indirectly* involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. For Mrs. Moffitt's interest in Dixon Ridge Farms, which is not publicly traded and has a net income of less than \$750,000, Regulation 18705.1(c)(4) applies. Under this subdivision, the financial effect of a governmental decision on the business is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Personal Finances:

An effect on an official's personal finances is material as stated in Regulation 18705.5(a), which provides:

“A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period.

Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. For a material financial effect to be foreseeable on an official’s interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Dixon Ridge Farms:

While staff of the Central Valley Water Board has not yet prepared an estimate of grower costs associated with the Sacramento Valley Order, you state that it appears that the cost increases to Dixon Ridge Farms resulting from the order will be less than \$5,000 per year. To the extent that the foreseeable cost increases to Dixon Ridge Farms are less than \$5,000 as you have stated, the financial effect of the Sacramento Valley Order is not material.

Personal Finances:

Based upon the facts provided, Dixon Ridge Farms is owned solely by Mrs. Moffitt’s parents. As an employee of Dixon Ridge Farms, it is unlikely that the order would have a foreseeable effect on Mrs. Moffitt’s personal finances of \$250 or more if the foreseeable cost increases to Dixon Ridge Farms resulting from the order are less than \$5,000. Barring additional facts indicating a potential effect on her personal finances, it does not appear that that a decision regarding the Sacramento Valley Order will have a reasonably foreseeable financial effect on Mrs. Moffitt’s personal finances.

Steps Seven and Eight: Does this governmental decision come within any exception to the conflict-of-interest rules?

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official’s interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific

circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, in light of the conclusion that Mrs. Moffitt is not prohibited from taking part in decisions regarding the Sacramento Valley Order, it is unnecessary for us to consider the exceptions to the conflict-of-interest rules at this time.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:vll